Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ABATE OF GEORGIA, INC.
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners
v.
STATE OF GEORGIA AND
GEORGIA DEPARTMENT OF PUBLIC SAFETY ET AL

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a decision by the Appellate Court of Georgia, which upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature versus applying a judicial limned viewpoint of a statute which conflicts with the plain meaning and intent of a statute may be set aside by the federal judiciary, when the decision by the State of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

II. Whether, in consideration of the Eleventh Amendment and Georgia law, claims against state agencies under state law claims, which are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.

III. Whether Appellees, individual actors are protected by immunity under the Eleventh Amendment, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the case.

IV. Whether the Eleventh Circuit Court of Appeals erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.

V. Whether the Eleventh Circuit Court of Appeals erred by finding that the Appellees have complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.

VI. Whether the Eleventh Circuit Court of Appeals erred by failing to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.

VII. Whether the Eleventh Circuit Court of Appeals erred by granting the Appellees' Motion to Dismiss.

VIII. Whether the Eleventh Circuit Court of Appeals erred by denying Petitioner/Appellant's Motion for Rehearing.

LIST OF PARTIES

Respondent/Defendants:

ROONEY L. BOWEN, III, in his Official and Individual Capacity as a Member of the Board of Public Safety,

ROY E. BARNES, in behalf of the STATE OF GEORGIA,

ROBERT E. HIGHTOWER, in behalf of the GEORGIA DEPARTMENT OF PUBLIC SAFETY, in his Official and Individual Capacity,

ROONEY L. BOWEN, III, in his Official and Individual Capacity as a Member of the Board of Public Safety,

JIM WETHERINGTON, in his Official and Individual Capacity as a Member of the Board of Public Safety,

CHIEF HUBERT L. SMITH, in his Official and Individual Capacity as a Member of the Board of Public Safety,

CHIEF REBECCA F. DENLINGER, in her Official and Individual Capacity as a Member of the Board of Public Safety,

DANIEL M. BRYANT, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF JACQUELYN H. BARRETT, in her Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF BRUCE HARRIS, in his Official and Individual Capacity as a Member of the Board of Public Safety,

ROBERT E. KELLER, in his Official and his Individual Capacity as a Member of the Board of Public Safety,

LYDIA J. SARTAIN, in her Official and Individual Capacity as a Member of the Board of Public Safety,

W.H. "DUB" HARPER, JR., in his Official and Individual Capacity as a Member of the Board of Public Safety,

WAYNE ABERNATHY, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF DONNIE HARALSON, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF GREOGORY T. COURSEY, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF JAMIL SABA, in his Official and Individual Capacity as a Member of the Board of Public Safety,

BOARD OF PUBLIC SAFETY, and
UNKNOWN CITY, COUNTY AND STATE LAW ENFORCEMENT AGENTS,

Petitioner/Plaintiff:

ABATE of Georgia, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner, ABATE of Georgia, Inc., is a Georgia corporation with no parent corporation and with no publicly held company owning more than ten-percent of its stock.

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I. The decision by the Appellate Court of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

II. **The Appellate Court erred when it dismissed this action, based in consideration of the Eleventh Amendment and Georgia law, which claims were against state agencies under state law, which claims are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses and acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.** (9)

III. **The Appellate Court erred when it held that, individual actors are protected by immunity under the Eleventh Amendment, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the case.** (13)

IV. **The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.** (17)

V. **The Appellate Court erred when it held that the Appellees had complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.** (18)

VI. **The Appellate Court erred when it failed to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.**(20)

VII. **The Appellate Court erred when it granted the Appellees' Motions to Dismiss.** (21)

VIII. **The Appellate Court erred by denying Petitioner/Appellant's Motion for Rehearing.**

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CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner respectfully advances that Petitioner has used 12 point Times New Roman for Petitioners application for Writ of Certiorari.

PETITION FOR WRIT OF CERTIORARI

COMES NOW ABATE OF GEORGIA, INC., Appellant, by and through undersigned counsel, and tenders Plaintiff/Appellant's Petition for Writ of Certiorari from the Eleventh Circuit Court of Appeals and shows this Honorable Court as follows:

SUMMARY OF ARGUMENT

For thirty-two (32) years the State of Georgia, the Appellees and via the various local and state law enforcement departments have been illegally enforcing O.C.G.A. § 40-6-315, against persons operating motorcycles in the State of Georgia. While the State of Georgia mandated statutory compliance upon the part of its citizens under the term "shall" pursuant to O.C.G.A. § 40-6-315(a) and (b), the State of Georgia has illegally taken the same mandatory language of "shall" upon the part of the State of Georgia, via the Board of Public Safety, to be discretionary and/or not requiring them to act as mandated pursuant to O.C.G.A. § 40-6-315(d).

The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees. O.C.G.A. § 40-6-315 contains four (4) distinctive subparts, expressed here in full, to wit:

> "(a) No person **shall** operate or ride upon a motorcycle unless he is wearing protective headgear which complies with standards established by the Board of Public Safety.
>
> (b) No person **shall** operate or ride upon a motorcycle if the motorcycle is not equipped with a windshield unless he is wearing an eye-protective device of a type approved by the Board of Public Safety.
>
> (c) This Code section **shall** not apply to persons riding within an enclosed cab or motorized cart. This Code section shall not apply to persons operating a three-wheeled motorcycle used only for agricultural purposes.
>
> (d) The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations

establishing standards and specifications for the approval thereof. The Board of Public Safety **shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**"
(O.C.G.A. § 40-6-315)(Emphasis Added).

The Appellate Court, in rendering judgment for the Appellees, adopted the District Court's admission that, "**it is undisputed that the Board of Public Safety has not published a list of all protective headgear and eye-protective devices by name and type which have been approved by it.**" (D-31., Page 4.) On the face of it, the Appellate Court's decision unnaturally eviscerates the plain language of the statute. Particularly the mandatory language "shall" as it applies to Appellees. The lower courts admitted, that the Appellees had not complied with the mandatory provisions of O.C.G.A. § 40-6-315(d), but nonetheless, both courts ruled in favor of Appellees. Furthermore, the Appellees have plainly and stated, ". . . **we have not publish[ed] lists of all protective headgear and eye-protective devices by name and type...[and we] are not going to do it!**"

The Eleventh Circuit in Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc), has further stated that the **"Interpretation of a statute begins 'with the language of the statute itself.' As a general rule, if the language of the statute is plain, then our interpretative function ceases and we should `enforce [the statute] according to its terms.'"** Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989).

It is Petitioner's position, supported by the Appellee's acquiescence and failure to challenge Appellant's position, that the lower courts erred in finding that, the mere adoption of corresponding federal manufacturing regulations was totally compliant with the mandatory language of the statute under challenge. These guidelines were established for manufacturers to "self-govern" themselves not for compliance by the general public, who in most cases are unaware of such provisions. It is also a logical conclusion that "to publish list of all protective headgear ... approved by it" is not the

equivalent of the mere adoption of corresponding federal manufacturing regulations. **Adopting some other formulaic regulation is not a "list of all protective headgear and eye-protective devices by name and type which have been approved."**

Jurisdiction is by discretionary review by Certiorari regarding interpretation of the laws of the State of Georgia and the United States pursuant to alleged violations of Petitioner's rights guaranteed under the United States Constitution. Petitioner seeks the review of the decision of the United States Court of Appeals for the Eleventh Circuit, whereby the Court of Appeals denied Appellant's Petition for Reconsideration on November 9, 2001.

It is Appellant's position that the lower courts committed at least eight (8) errors when it granted the Appellees' motion to dismiss. Petitioner/Appellant advances the following specific grounds, to wit:

I. The Appellate Court erred when it determined that it would be improper to undercut the Georgia Appellate Court decision in Dowis v. State, 243 Ga. App. 354 (2000), when that decision by the Appellate Court of Georgia, upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature, versus applying a judicially painted viewpoint of a statute which conflicts with the plain meaning and intent of a statute, and when the decision by the Appellate Court of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

II. The Appellate Court erred when it dismissed this action, based in consideration of the Eleventh Amendment and Georgia law, which claims were against state agencies under state law, which claims are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses and acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.

III. The Appellate Court erred when it held that, individual actors are protected by immunity under the Eleventh Amendment, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the case.

IV The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.

V. The Appellate Court erred when it held that the Appellees had complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.

VI. The Appellate Court erred when it failed to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.

VII. The Appellate Court erred when it granted the Appellees' Motions to Dismiss.

VIII. The Appellate Court erred when it denied the Appellant's Petition for Rehearing.

ARGUMENT AND CITATION OF AUTHORITY

I. **The Appellate Court erred when it determined that it would be improper to undercut the Georgia Appellate Court decision in Dowis v. State, 243 Ga. App. 354 (2000), when that decision by the Appellate Court of Georgia, upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature, versus applying a judicially painted viewpoint of a statute which conflicts with the plain meaning and intent of a statute, and when the decision**

by the Appellate Court of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

The Honorable Panel in the Appellate Court adopted the decision rendered by the District Court as rendered by the Georgia Court of Appeals in Dowis v. State, advancing as its reasoning, that to void the same would undercut that decision rendered by the Georgia Court of Appeals.

It is Petitioners' position that the federal judiciary has the legal and lawful right and duty to set aside any decision by the State of Georgia, which violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution. Dowis upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature, versus applying a judicially painted viewpoint of a statute, which conflicts with the plain meaning and intent of a statute, as does the Dowis decision.

The Georgia Legislature passed the O.C.G.A. § 40-6-315 and it was signed into law. The purpose of the instant statute was to provide the citizens of the State of Georgia with the knowledge and ability to determine whether a citizen's legal activities, relating to the operation of a motorcycle, was in compliance with the instant statute.

Logically the Georgia Legislature, provided the Georgia Department of Public Safety with the discretion to determine the appropriate headgear and eye-protective gear which would meet the statutory requirements and demanded, pursuant to the term "shall" that **"[T]he Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it."** While the Appellees have formulated the testing and construction basis for headgear and eye-protective devices, they have in fact under current laws, required that the citizens of the State of Georgia, without access to such, make a self determination whether their equipment meets the statutory requirements without complying with the mandatory part of the instant statute.

The absolutely clear statutory purpose of § 40-6-315(d), was for the Georgia Department of Public Safety, by and through the Board of Public Safety, to have the discretion to determine minimum standards for headgear and eye-protective devices and to determine the products for sale to the general public, within the State of Georgia, that have met those standards **and thereafter publish a list** of the same so that the citizens of Georgia could readily determine whether they are in compliance.

The Appellees have willfully and deliberately voided, evaded and abrogated the statutory language of O.C.G.A. § 40-6-315(d) and illogically contends that the Appellees conduct pursuant to the statute is constitutionally valid and therefore not open to any legal challenge by Appellant. The lower courts committed error by accepted this position as evidenced by the dismissal of Plaintiff/Appellant's case.

O.C.G.A. § 40-6-315(a) and (b), demands that the citizens "shall" comply with the requirements of each of the statutory mandates set for in each statutory provision.

The Appellees have demanded and continue to demand and enforce its will upon the citizens of the State of Georgia through the inherent language of the statute. However, the State of Georgia, Georgia Department of Public Safety, through the Board of Public Safety have willfully and deliberately refused to abide by it's mandated obligations as imposed by the language of O.C.G.A. § 40-6-315(d). Instead, the Appellees through the State's highest legal authority, the Attorney General's Office, has taken the position that mandatory language of the statute in question is only discretionary versus the plain language of the statute which imposes mandatory obligations upon the State of Georgia relating to the totality of the statute.

The Appellate Court, in rendering judgment for the Appellees, adopted the District Court's admission that, "**it is undisputed that the Board of Public Safety has not published a list of all protective headgear ... approved by it.**" (D-31., Page 4.) On the face of it, the Appellate Court's decision unnaturally eviscerates the plain language of the

statute. Particularly the mandatory language "shall" as it applies to Appellees. The lower courts admitted, that the Appellees had not complied with the mandatory provisions of O.C.G.A. § 40-6-315(d), but nonetheless, both courts ruled in favor of Appellees.

Abrogation versus Precatory

In Blessing v. Freestone, 520 U.S. 329, 341 (1997), this Honorable Court, in looking at the construction of a statute that compels a governmental agency to act has stated that **the statute must unambiguously impose a binding obligation on the governmental body in question.**

The clear and unambiguous language of O.C.G.A. § 40-6-315(d), clearly mandates under the legal term "shall" that the "[T]he Board of Public Safety **shall publish lists** of all protective headgear ... *approved by it.*"

The Eleventh Circuit in Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc), has further stated that the **"Interpretation of a statute begins 'with the language of the statute itself.' As a general rule, if the language of the statute is plain, then our interpretative function ceases and we should 'enforce [the statute] according to its terms.'"** Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989).

The logical purpose for which the Georgia Legislature passed O.C.G.A. § 40-6-315(d) was so that the very situation that now exists, would not arise. A person who operates a motorcycle within the legal parameters pursuant to O.C.G.A. § 40-6-315(a) and (b) would know, pursuant to **a published list of all approved, protective headgear and eye-protective devices**, which precisely it was lawful to wear while operating a motorcycle. However, instead, the State of Georgia has committed itself to the willful evasion and deliberate abrogation of the legal language of O.C.G.A. § 40-6-315(d), and illegally has declared that the mandatory requirement of the Board of Public Safety to "... **publish lists** of all protective headgear ... approved by it" is a solely discretionary

function upon its part, and that the Appellees may not comply with in their sole discretion.

The plain language of O.C.G.A. § 40-6-315(d), is absolutely clear. Under no stretch of the legal imagination should the Board of Public Safety be permitted to treat the statutory language of O.C.G.A. § 40-6-315(d), with the lawful authority to consider the language of that statute to empower them with **discretionary, abrogational or precatory authority** to avoid the mandatory requirements imposed by the Georgia Legislature pursuant to O.C.G.A. § 40-6-315(d) to ". . . **publish lists** of all protective headgear … approved by it."

Petitioner respectfully advances that the lower courts' determinations, as affirmed by the Appellate Court, that amendments to O.C.G.A. § 40-6-315, by the Georgia General Assembly substituting the newly created Commissioner of Motor Vehicle Safety as the applicable regulatory authority in place of the Board of Public Safety, effective July 1, 2001, mitigate the circumstances and violations plead in this action. It has absolutely no relevancy to whether or not the Appellees have violated the law. (D-31-Page 3.). Some future act, which may change whom violates or does not violate the law is not relevant to the acts and actions, which have occurred to date. See Adler v. Duval County School Bd., 206 F.3d 1070 (11th Cir. 2000): Harris v. Garner, 190 F.3d 1279, 1284 (11th Cir. 1999)(Absent mistake or absurdity, we implement the statutory language as enacted); Salinas v. United States, 522 U.S. 52, 57-58 (1997).

The Georgia judicial system has likewise adhered to the same legal line of statutory construction and interpretation as recognized by the federal judiciary. The Georgia Supreme Court in Holmes v. Chatham Area Transit, 234 Ga. App. 42, 44 (1998), found that:

> "[I]t is axiomatic that if an enactment is plain and unambiguous, we must give its words their plain and ordinary meaning, except for words which are terms of art or have a particular meaning in a specific context. We must seek "to give meaning to each part of the statute and to avoid constructions which render a portion of the statute mere surplusage."

The Georgia Court of Appeals in Moritz v. Orkin Exterm. Co., 215 Ga. App. 255, 256-257 (450 S.E.2d 233) (1994), found:

> "[A] statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes "in pari materia," are construed together, and harmonized wherever possible, so as to ascertain the legislative intendment and give effect thereto."

Citing, Bennett v. Wood, 188 Ga. App. 630, 632 (1) (373 S.E.2d 645) (1988).

Finally, "[i]t is a basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning." (Punctuation omitted.) Gilbert v. Richardson, 264 Ga. 744, 747-748 (3) (1994).

The Appellees have ignored the clear and plain language of O.C.G.A. § 40-6-315(d), and the lower courts have likewise accepted their legal position and ruled that since the law is going to be changed in the future, that the Appellant's legal arguments are without merit. Logically, if the State of Georgiapursuant to O.C.G.A. § 40-6-315(a) and (b) will not allow its citizens to declare the mandatory term "shall" to be discretionary as to compliance, then, the same legal and logical basis of the demand that the term "shall" in O.C.G.A. § 40-6-315(d), also mandates a duty which must be fulfilled by the State of Georgia through the Board of Public Safety. The State of Georgia cannot abrogate O.C.G.A. § 40-6-315(d) while taking the opposite legal position as to O.C.G.A. § 40-6-315(a) and (b) and declare that the mandatory term "shall." **It should not be approved by this Honorable Court, that within a single statute, the word "shall" is mandatory in one subsection, but permissive in another sub-section *of the same statue*.**

Petitioner respectfully moves for this Honorable Court's consideration of comparative analysis between the statute under challenge

and a statute, while no law would have the same application of law and logic. For instance assume that the State of Georgia mandated, pursuant to the following statute that the citizens of the State of Georgia were, due to environmental pollution, to use a specific type of gas and safety devices in their motor vehicles, to wit:

A. No person **shall** operate a motor vehicle within the State of Georgia unless the vehicle is equipped with air bags and seat belts approved by the Commissioner of Motor Vehicle Safety.

B. This Code section **shall** not apply to persons operating motor vehicles within the interstate highway system whose occupants are not citizens of the State of Georgia.

C. The Commissioner of Motor Vehicle Safety is authorized to approve or disapprove all air bags and seat belts, which meet the requirements of this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. The Commissioner **shall publish lists of all air bags and set belt devices by name and type approved by the Commissioner.**

If the Commissioner of Motor Vehicle Safety instead of publishing a list of air bags and seat belts by name and type, which meet the statutory requirement of the aforementioned statute, only adopted rules and regulations, as done in the present case, **how would the citizens of the State of Georgia know whether or not they were in compliance with the law?** The answer to that question is the same as in the present case, a citizen would not know if the air bag or seat belt met the statutory requirements.

The lower courts referred to the decision by the Georgia Court of Appeals in Dowis in which the Georgia Court of Appeals ruled that the Appellees do not have to comply with the plain and mandatory language of the statute in question.

While the Appellees have sought the protection of the decision by the Georgia Court of Appeals in Dowis, Petitioner respectfully advances that the Dowis decision is inherently defective and goes against Gilbert v. Richardson, 264 Ga. 744 (1994), as well as in Holmes v. Chatham Area Transit, 234 Ga. App. 42 (1998); Moritz v. Orkin Exterm. Co., 215 Ga. App. 255 (1994); Bennett v. Wood, 188 Ga. App. 630 (1988).

Petitioner respectfully advances that the decision rendered in Dowis Court goes against the statutory language of the statute in question and that decision is erroneous in the face of the absolutely plain language and purpose of the statute. If Dowis is lawful, then it is lawful for the citizens of the State of Georgia to declare that O.C.G.A. § 40-6-315(a) and (b), are likewise discretionary upon the part of the citizens to which it may be applicable. Petitioner respectfully advances that the Georgia Court of Appeals in Dowis, **promotes disrespect for the law**, because the State of Georgia is advancing the legal theory that the citizens are to do what the State of Georgia says,
but the State of Georgia is not required to follow the same laws by which they demand absolute compliance by its citizens.

II **The Appellate Court erred when it dismissed this action, based in consideration of the Eleventh Amendment of the United States and Georgia law, which claims were against state agencies under state law, which claims are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses and acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.**

Appellees have not challenged, nor refuted, that the Petitioner timely filed ante litem notices. Likewise, the Appellees have not challenged Petitioner's position, as advanced below, such ante litem notices, waived the Appellees' Eleventh Amendment rights so that a state law claim can be

raised and prosecuted. Appellees have instead merely recited that the Eleventh Amendment of the United States Constitution, protects against suits against state officials in their official capacity and nothing else whatsoever. Likewise, the Appellees have not argued that Georgia's ante litem statutes do not waive their Eleventh Amendment rights, rather they have instead chosen to ignore this Petitioner's claims and hope that the judiciary chooses not to address the issue in its decision.

Petitioner attacks the lower courts' determinations that the Appellees are protected pursuant to the Eleventh Amendment of the United States Constitution. Petitioner respectfully advance that the Appellate Court erred when it affirmed the District Court in determining that the Eleventh Amendment foreclosed Appellant's claims against the named agency Appellees. Petitioners' Second Amended Complaint, clearly states the grounds upon which the Petitioner was advancing jurisdiction before the lower court, to wit:

> "Plaintiff asserts statutory jurisdiction pursuant to Title 28, United States Code § 1331. Additional jurisdiction is anchored pursuant to Title 42, United States Code § 1983, and First, Fifth, Fourteenth Amendments of the United States Constitution. **Plaintiff has tendered such ante litem notices which waives immunity to said state agency pursuant to Georgia Tort Claims Act as with OCGA § 50-21-26, and jurisdiction pursuant to OCGA § 51-12-5.1(b)**" (Emphasis Added)(D-10., Page 4. and 5.).

Petitioner conceded that federal claims, totally pursuant to Title 42, U.S.C. § 1983, do not pierce the immunity issues pursuant to the Eleventh Amendment of the United States Constitution, against the state agencies named in the Appellant's Second Amended Complaint. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

However, Petitioner respectfully asserts that the Petitioner/Appellant clearly and distinctly raised state law claims against the Appellee agencies in the Petitioner/Appellant's Second Amended Complaint. Likewise, Petitioner/Appellant stated the statutory provisions under which the

Appellant was pursuing Appellant's state law claims. (D-10, Page 4. and 5.). It is Petitioners' position that lower court could have and should have recognized the Appellant's state law claims and erred by not doing so.

The federal courts, particularly, the Eleventh Circuit, have repeatedly recognized the right of litigants to raise state law claims and federal claims in suits filed in the federal forum. Peterson v. BMI Refractories, 132 F.3d 1405 (11th Cir. 1998).

In the face of the Petitioner/Appellant's clear assertion of state law claims, the lower court ignored the Appellant's legal claims against the Appellee agencies, under state law, as advanced pursuant to Appellant's invoking such legal rights pursuant to Georgia's ante litem notices as codified pursuant to O.C.G.A. § 50-21-26 and O.C.G.A. § 51-12-5.1(b). Instead the lower courts have erroneously advanced, pursuant to Appellant's 1983 claims, that the Eleventh Amendment forecloses Petitioner/Appellant's claims against the instant state agencies.

Petitioner respectfully advances that the claims against the Appellee agencies, by the receipt of the Petitioner's ante litem notices, clearly waived the Appellee agencies' Eleventh Amendment rights as to the Petitioner/Appellant's claims against them. Petitioner respectfully advances that the Appellate Court, in affirming the District Court erroneously mixed up and legally dumped the Appellant's state law claims into the Appellant's federal law claims raised pursuant to Title 42, U.S.C. § 1983.

Petitioner respectfully advances, based upon the Appellees' failure to address the Appellant's legal claims relating to the ante litem issues, that the Appellees have legally conceded in acquiescence that the Appellant's claims have merit and that the lower court erred in not recognizing this.

III. **The Appellate Court erred when it held that, individual actors are protected by immunity under the Eleventh Amendment of the United States Constitution, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the**

case.

The Appellees' responses to this legal claim have been to advance that the Petitioner/Appellant has cited absolutely no federal law in its favor on this issue. The Appellees have advanced Saucier v. Katz__, 533 U.S._____ (2001). Petitioner respectfully advances that the Saucier decision supports the Petitioner's position versus that as advanced by the Appellees. For instance, at no time, prior to the initiation of the instant case before the United States District Court, did the Attorney General's Office of the State of Georgia ever render any determination concerning O.C.G.A. § 40-6-315(d), and that the language of that statute was totally discretionary. In other words, the reader of O.C.G.A. § 40-6-315(d), would clearly believe that there was a mandatory duty by the members of the Board of Public Safety to ". . . **publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**" And if the members of the Board of Public Safety did not publish, as required pursuant to O.C.G.A. § 40-6-315(d), then the individual members of the Board of Public Safety were acting outside their legal and lawful authority.

In the face of O.C.G.A. § 40-6-315(d), the Appellees have plainly and forthrightly stated, . . . we have not **"publish[ed] lists of all protective headgear and eye-protective devices by name and type"** as required by the instant statute, and we ". . . **are not going to do it!**" It is the Appellees' position that if the citizens of the State of Georgia cannot figure out the formulas we established concerning headgear and eye-protective gear, not withstanding the fact that they do not have access to these formulas in the first place, then the Appellees can financially pad the State and local financial coffers until the citizens of the State of Georgia do learn!

The legal issues are whether the lower courts' findings that the plain language of O.C.G.A. § 40-6-315(d), in the face of the mandatory legal term of "shall" to be discretionary, and likewise, the lower courts'

declaration that the individual Appellees are immune from the Petitioner/Appellant's claims based upon qualified immunity are legally valid. Petitioner respectfully asserts that the lower courts' decisions are not legally valid.

The legal perimeters upon which the lower courts were restricted to in consideration of the Appellees numerous motions to dismiss have been clearly declared in the Eleventh Circuit Court's decision rendered in Marshall County Board of Education v. Marshall County Gas District, 992 F.2d 1171, 1174 (11th Cir. 1993). In Marshal the court advanced that the legal perimeters in considering a motion to dismiss requires the lower courts to take the **factual allegations of the Plaintiffs' Complaint ... as true for the purposes of a motion to dismiss**. Petitioners respectfully advances that the lower court placed the Appellees' motions to dismiss upon the legal level of motions for summary judgment versus the correct legal perimeters of consideration.

If, as claimed in the Petitioner's Second Amended Complaint, that O.C.G.A. § 40-6-315(d), mandated that the Board of Public Safety ". . .shall publish lists of all protective headgear ... approved by it" and the Board of Public Safety, via its individual board members, failed to follow and adhere to their mandatory duties to ". . . publish lists of all protective headgear ... approved by it", then the Petitioner respectfully advances that **they have acted outside their legal and lawful position of authority**.

It is Petitioner's position that the lower courts applied the wrong standard to render its judgment in the instant case. It is Petitioner's position that the lower court was required to accept the Appellant's factual allegations as true. In other words, that O.C.G.A. § 40-6-315(d), mandated that the Board of Public Safety ". . .**shall publish lists** of all protective headgear and eye-protective devices by name and type which have been approved by it" and the Board of Public Safety, via its individual board members, failed to follow and adhere to their mandatory duties to ". . . publish lists of all protective headgear ... approved by it" and **therefore they have acted outside their legal authority**.

The Appellees' advancement, as affirmed by the Appellate Court's decision, that the statutory term of "shall" in context to O.C.G.A. § 40-6-315(d), is discretionary and therefore they are entitled to the protections of qualified immunity is patently baseless.

The district court correctly advanced. And the Appellate Court affirmed, "[T]o establish a Section 1983 violation, Plaintiffs must show (1) conduct committed by a person acting under color of state law (2) that deprived them of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Duke v. Massey, 87 F.3d 1226, 1231 (11th Cir. 1996)." (D-31., Page 13. and 14.).

However, it is Petitioner's position that the Appellate Court, affirming the District Court's determination, in the face of the absolutely clear language of O.C.G.A. § 40-6-315(d), that the term "shall" is discretionary and the individual Appellee members of the Board of Public Safety are entitled to qualified immunity is clearly erroneous.

The lower courts have, by their decisions, declared that any statutory obligations upon the officials of the State of Georgia, pursuant to the mandatory term "shall" is only discretionary obligation and function to be performed if and when the official decides that he or she may want to perform the mandatory functions of his or her office. It is Petitioner's position that, **if** the State of Georgia can advance to the lower courts that O.C.G.A. § 40-6-315(a) and (b) are mandatory upon the part of the citizens of the State of Georgia and yet O.C.G.A. § 40-6-315(d) is discretionary, **then,** the statute is vague across the board. If this is allowed, all the Georgia statutes, which contain the mandatory term of "shall", must be declared "discretionary." This logic is clearly erroneous, but it is logic adopted by the lower courts in this case.

Petitioner respectfully advances that the individual Appellee members of the Board of Public Safety, are not cloaked with qualified immunity and never have been under the facts of the case and that the lower courts erred in granting immunity.

Likewise, injunctive and equitable relief clearly does not require a waiver of the Eleventh Amendment rights of the Appellees by the Appellant. Injunctive and equitable relief is the inherent right of the federal forum against the individual states of the United States. In Re Employment Discrimination Litigation, 198 F.3d 1305 (11th Cir. 2000); Ex Parte Young, 209 U.S. 123, 159-60 (1908).

IV The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.

In 1969, the Georgia Legislature passed O.C.G.A. § 40-6-315, and it was enacted into law by the signature of the Governor of the State of Georgia. O.C.G.A. § 40-6-315 is expressed in its entirety at page one and two of this petition. For the past thirty-two (32) years the State of Georgia has been enforcing O.C.G.A. § 40-6-315, by and through its various law enforcement agencies, both state and locally.

Thousands of citations have been issued against individuals who have operated motorcycles within the State of Georgia for allegedly violating O.C.G.A. § 40-6-315 by the various law enforcement agencies of the State of Georgia.

Likewise, for Thirty-two (32) years the Georgia Department of Public Safety has issued points against the driver's license. Each of the thousands of individuals who have been cited with violating O.C.G.A. § 40-6-315 in some cases, revoking the driving privileges of those citizens, because of the points assessed to a violation of O.C.G.A. § 40-6-315. This caused the citizens' driving privileges to be suspended and/or revoked because the points exceeded the total points as allowed by law to be accumulated at the time of the citations.

For the past thirty-two (32) years, The Board of Public Safety, through the individual members of the Board of Public Safety have and presently continue, to violate the rights of the citizens of Georgia, under the Constitution of the United States, and deliberately and willfully caused the evasion of O.C.G.A. § 40-6-315(d) by failing to comply with the mandatory

requirements of that part of the statute to "**publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**"

The plain language of the statute combined with the most basic and accepted principals of statutory construction, as set out more fully above, clearly indicate that the language of O.C.G.A. § 40-6-315 are indeed mandatory, for citizens AND state agencies and state actors.

Petitioner respectfully asserts that the lower courts have erred in determining that O.C.G.A. § 40-6-315 did not impose a mandatory duty and obligation upon the Appellees.

V. The Appellate Court erred when it held that the Appellees had complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.

The Appellees failed to address another of the Appellant's enumerations of error before Court of Appeals. It is Petitioner's position that the Appellees' failure to address this legal issue constitutes an admission. That the lower courts failed to recognize this acquiescence was error. The issues in question here, as raised by the Petitioner/Appellant, was the lower court's determination that, "Pursuant to the authority granted by the statute, the Board of Public Safety has promulgated rules and regulations that establish standards for headgear and eye-protective devices." See Ga. Comp. R. & Regs.r. 570-12-.01 to -.10 (2000)(regulating eye-protective devices); id. At r. 570-13-.01 to -.10 (regulating motorcycle headgear). These regulations define technical standards that acceptable headgear and eye-protective devices must satisfy. The regulations also require that manufactures affix a permanent label show that the equipment complies with the applicable standard. See id. At r. 570-12-.10 (eye protective device); id. At r. 570-13-.05 (headgear). Helmets are held to the standard set by the United States

Department of Transportation. See id. At r. 570-13..01 (1) ("Future reference to standards as for specifications, statute [sic] or regulations will be the current version of the United States Department of Transportation, National Highway Traffic Safety, Federal Motor Vehicle Safety Standards; Motorcycle Helmets. This will permit automatic adjustment to future revisions or adjustments in the standards."). Compliance requirements for eye-protective devices is determined in accordance with those test methods described in Section 6.3.4.1.1, 6.3.4.1.2. and 6.3.4.1.3. of the American Standards Institute Standard Z87.1-1968, September 1968, "Eye and Face Protection" and explained in Section 10.1 of the National Bureau of Standards Circular 533, May 20, 1953, "Method for Determining the Resolving Power of Photographic Lenses. Id. At r. 570012-.05(e)." (D-31., Page 3 and 4.)."

As advanced in Appellant's Brief in the court below, Petitioner reasonably believed that none of the members of the Honorable Panel in the Court of Appeals had ever heard of the foregoing regulations. Petitioner now asserts the reasonable belief that the members of this Honorable Court are likewise unfamiliar with the foregoing regulations.

If the members of the judiciary have never heard of the same, then it is more than a fairly reasonable assumption that the individual citizens of the State of Georgia are not aware of the same regulations. Furthermore, the Georgia Department of Public Safety cannot direct a citizen to where he or she can obtain the same. **Under the circumstances, it is impossible for a citizen to determine if they are in compliance with the statute, yet citizens have the same statute enforced against them, via citations and fines for failing to comply with that very statute.**

> O.C.G.A. § 40-6-315(d) states that,
> "[T]he Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof.

The Board of Public Safety *shall* publish lists of all protective headgear and eye-protective devices by name and type, which have been approved by it."

O.C.G.A. § 40-6-315(d)(Emphasis Added).

It is Petitioner's logical interpretation of "to issue and enforce regulations establishing standards and specifications for the approval thereof" was legislated by the Georgia Legislature to provide the Board of Public Safety with authority "to issue and enforce regulations establishing standards and specifications for the approval thereof" to be used by the Board of Public Safety in performance of its **mandatory function** to " . . . publish list of all protective headgear and eye-protective devices by name and type which have been approved by it."

It is Petitioner's position, supported by the Appellee's acquiescence and failure to address, refute, or challenge Appellant's position, that the lower court erred in finding that, the mere adoption of corresponding federal manufacturing regulations was totally compliant with the mandatory language of the statute under challenge. These guidelines were established for manufacturers to "self-govern" themselves not for compliance by the general public, who in most cases are unaware of such a provision. It is also a logical conclusion that "to publish list of all protective headgear . . . approved by it" is not the equivalent of the mere adoption of corresponding federal manufacturing regulations. Adopting some other formulaic regulation is not a "list of all protective headgear and eye-protective devices by name and type which have been approved."

VI The Appellate Court erred when it failed to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.

Again, in the Appellate Court, the Appellees chose not to address the Appellant's contention that the lower court erred in denying the Appellant's Motion for Temporary Restraining Order. Again, by the Appellees' acquiescence and failure to address this legal issue, as raised by the Appellant, constitutes an admission that the lower court erred. Petitioner/Appellant sought a discretionary appeal of the lower court's denial

of the Appellant's TRO/PI, and the Court of Appeals declined to grant the same, which was error.

Petitioner respectfully advances that the lower court failed to take into due consideration that Appellant's claims against the Appellees seeking temporary restraining order or in the alternative a preliminary injunction (hereinafter referred to as "TRO/PI").

Petitioner sought a TRO/PI to stop the Appellees from further illegal acts and actions in relationship to O.C.G.A. § 40-6-315, until the Appellees complied with the mandatory provisions of O.C.G.A. § 40-6-315(d).

The Eleventh Circuit has taken the position that an entry of a preliminary injunction is appropriate when the moving party demonstrates: (A) substantial likelihood of success on the merits; (B) that irreparable injury will be suffered unless the injunction issues; (C) that the threaten injury to the movant outweighs whatever damage the injunction may cause the opposing party; and (D) that granting the injunction will not be adverse to the public interest. See McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998); Church v. City of Huntsville, 20 F.3d 1332, 1343 (11th Cir. 1994); Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1022 (11th Cir. 1989).

It is Petitioner's position that the lower court abused its discretion in denying Appellant's motion for a TRO/PI, it was further error for the Appellate Court to affirm that decision. For all intent and purposes the lower courts ruled that the citizens of the State of Georgia who ride motorcycles must attempt to locate regulations from unknown persons and parties and thereinafter attempt to see if the equipment meets the specifications of the regulations advanced by the Appellees as applicable. In light of the fact that the Appellees do not provide access to the citizens of the State of Georgia to the regulations in question, the logical question which must be answered is ***how*** is a citizen to make a determination that the equipment to be purchased meets the regulations as approved by the Georgia Board of Public Safety?

VII **The Appellate Court erred when it granted the**

Appellees' Motions to Dismiss.

Again, the Appellees, chose not to respond to this issue at the Appellate level. Petitioner again contends that the Appellees' failure to address this specific legal issue constitutes that the Appellees have conceded this legal issue.

Notwithstanding the fact that the Appellees chose not to address this issue, it is the Appellant's position, as earlier stated, the Appellate Court's review of a District Court's grant of a motion to dismiss under Rule 12(b)(6) is de novo. McKusick v. City of Mulbourne, Fla, 96 F.3d 478 (11th Cir. 1996); Barnett v. Bailey, 956 F.2d 1036, 1039 (11th Cir. 1992). The factual allegations of the Plaintiffs' Complaint are accepted as true for the purposes of a motion to dismiss. Marshall County Board of Education v. Marshall County Gas District, 992 F.2d 1171, 1174 (11th Cir. 1993).

The district court never accepted the factual allegations of the complaint and the Appellate Court, in turn affirmed that analysis. The District Court, as affirmed by the Court of Appeals, did not accept the plain language of O.C.G.A. § 40-6-315(d), but read into the instant statute what the Appellees asserted. In other words, that the only thing that the Appellees had to do was nothing, unless they wanted to do something under the guise that the legal term "shall" in O.C.G.A. § 40-6-315(d), was merely discretionary and was only an illusionary requirement upon the part of the Board of Public Safety requiring that the Board of Public Safety "... **shall publish lists of all protective headgear ... approved by it.**"

The District Court, as affirmed by the Appellate Court has **created and established**, in behalf of the State of Georgia and the Appellees that the legal term "shall" when placed in mandatory statutory language is only discretionary. Petitioner respectfully advances that the lower court did not read, interpret, or logically apply the standing case law to the lower court's legal determination of O.C.G.A. § 40-6-315(d). Petitioner respectfully advances that the lower courts: (1) ignored the clearly statutory language of O.C.G.A. § 40-6-315(d); (2) created a discretionary application of the statute in the face of the clear mandatory language of the statute; (3) that the lower court ignored the Appellant's state law claims against the State

agencies when invoked pursuant to Appellant's ante litem notices served upon the same.

Instead of addressing the factual basis of the statute under attack, the Appellees, as sanctioned by the District Court and affirmed by the Appellate Court, launched their attack upon the legal grounds that the State of Georgia has a lawful and legal right to have a statute which requires its citizens to wear helmets while riding on motorcycles. Picou v. Gillum, 874 F2d 1519 (11th Cir. 1989) and that the State of Georgia has no statutory obligations whatsoever but is only moderated by its discretion. The Appellate Court, in error, accepted this argument as authoritative.

Petitioner has never asserted that the State of Georgia lacks a lawful or legal right to pass a statute requiring citizens to wear motorcycle helmets. Rather, Petitioner is and has been challenging the present statute on the books of the State of Georgia as being unconstitutionally vague as defined and being enforced. Kolender v. Larson, 461 U.S. 352 (1983); Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); United States v. Davis, 36 F.3d 1424 (9th Cir. 1994), cert. denied, 115 S.Ct. 1147 (1995); United States v. Martinez, 49 F.3d 1398 (9th Cir. 1995), cert. denied, 116 S.Ct.749 (1996). See Also United States Doremus, 888 F.2d 630 (9th Cir. 1989). The Appellate Court, in affirming the District Court failed to analyze this case based on the issues presented by this Petitioner and held in favor of the Appellants in a manner contrary to law and contrary to the well plead facts and law, asserted below.

VIII **The Appellate Court erred when it denied the Appellant's Petition for Reconsideration.**

For all of the above stated reasons, the Court of Appeals should have granted Appellant's Petition for Reconsideration.

CONCLUSION

Appellant respectfully moves for this Honorable Court to grant review by Certiorari and reverse the Appellate Court on all of the foregoing legal issues.

Respectfully submitted,

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